

United States Court of Appeals

Eleventh Circuit

56 Forsyth Street, N.W.

Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Reply, Give Number
Of Case and Names of Parties

July 30, 2004

VIA FACSIMILE

TO ALL COUNSEL OF RECORD

Re: No. 02-14469 - Thomas Johnson, et al. v. Governor of the State of Florida, et al.

Dear Counsel:

For the purposes of the upcoming en banc rehearing in the above-referenced case, the court desires for counsel to focus their briefs on the following issues:

1. **Considering the statutory text, congressional intent, Section 2 of the Fourteenth Amendment, and the relevant principles of statutory construction -- with particular attention to those set out in Yu Cong Eng v. Trinidad, 271 U.S. 500, 46 S. Ct. 619, 70 L. Ed. 1059 (1926), City of Rome v. United States, 446 U.S. 156, 100 S. Ct. 1548, 64 L. Ed. 2d 119 (1980), Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987), Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988), and Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) -- does § 2 of the Voting Rights Act (VRA) reach disenfranchisement provisions?**
2. **Assuming § 2 of the VRA reaches disenfranchisement provisions, would Congress have exceeded its enforcement authority under § 2 of the Fifteenth Amendment?**
3. **What are the differences between the texts of the 1868 disenfranchisement provisions and the 1968 disenfranchisement provision? What is the significance of these differences between the constitutional provisions?**
 - a. **Pay particular attention to the fact that the 1868 constitution not only contained a self-executing provision that automatically disenfranchised “any person convicted of felony . . . unless restored to civil rights,” Fla. Const. of 1868, art. XIV, § 2, but also included additional language that “[t]he Legislature shall have power and shall enact the necessary laws to [disenfranchise] all persons convicted of bribery, perjury, larceny, or of infamous crime,” id., art. XIV, § 4 (emphasis added). The 1968 disenfranchisement provision does not contain this additional language. Fla. Const of 1968, art VI, § 4 (“No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights . . .”).**
 - b. **Pay particular attention to the fact that the Fourteenth Amendment contains a blanket prohibition against all state laws that discriminate on the basis of race. Would this blanket prohibition not trump any state law that so discriminates, and therefore would it not be correct to conclude that even though a state legislature can disenfranchise persons convicted of various crimes, it cannot do so on**

the basis of race?

- 4. As plaintiffs are challenging the current (1968) disenfranchisement provision, if plaintiffs are able to show that the 1868 provision was enacted with racial animus, what effect -- if any at all -- would that showing have in analyzing the validity of the 1968 provision under the first prong of Hunter v. Underwood, 471 U.S. 222, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985), which requires plaintiffs to show race was a substantial or motivating factor behind the challenged provision?**
- 5. Assuming the 1868 provision was enacted with racial animus, what must the state of Florida, under Hunter, have done in 1968 to be deemed to have enacted a valid disenfranchisement provision?**
- 6. In ruling on Florida's motion for summary judgment, did the district court view the evidence and all factual inferences therefrom in the light most favorable to the opposing party, and did the district court resolve all reasonable doubts about the facts in the non-movant's favor?**

Appellant's opening brief shall be filed in the Clerk's Office in Atlanta by 5:00 p.m., Friday, August 27, 2004. Appellee's opening brief shall be filed in the Clerk's Office in Atlanta by 5:00 p.m., Friday, September 24, 2004. Any reply brief by the Appellants must be filed in the Clerk's Office in Atlanta by 3:00 p.m., Thursday, October 7, 2004. NO EXTENSIONS WILL BE GRANTED. An original and 18 copies of the en banc briefs should be filed (appellant's in blue covers, appellees' in red covers and any reply in gray covers). The parties are expected to insure that all other parties receive a copy of their briefs before the close of business on the day of filing (facsimile, e-mail, etc.). NO TIME FOR MAILING SHALL BE ALLOWED. All parties are also required to upload the brief in electronic format to the court's Web site as described in 11th Cir. R. 31-5.

All counsel are requested to file 16 copies of their opening panel briefs (bound in colored covers), record excerpts and supplemental authorities prior to 5:00, **Friday, August 27, 2004**.

The case will be argued before the Court sitting en banc during the week of October 25, 2004, in Atlanta, Georgia. Counsel will be allotted twenty minutes per side for oral argument. Counsel will receive a calendar notifying of the specific date and time of oral arguments at a later date.

Thank you for your attention to this matter.

Sincerely,

THOMAS K. KAHN, Clerk

By:

Matt Davidson
Calendar Clerk/Court Sessions Supervisor
404.335.6131